Securities And Exchange Commission v. Heinen et al Doc. 34

MARC J. FAGEL (Cal. Bar No. 154425)
fagelm@sec.gov
ROBERT L. MITCHELL (Cal. Bar No. 161354)
mitchellr@sec.gov
MARK P. FICKES (Cal Bar No. 178570)
fickesm@sec.gov
SAHIL DESAI (Cal. Bar No. 197358)
desais@sec.gov

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2600
San Francisco, California 94104
Telephone: (415) 705-2500
Facsimile: (415) 705-2501

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

NANCY R. HEINEN,

Defendant.

Case No. C-07-2214 (JF)

SECOND JOINT CASE MANAGEMENT STATEMENT

CMC Date: March 14, 2008
Time: 10:30 a.m.
Location: Courtroom 3, 5th Floor
Hon. Jeremy Fogel

On September 7, 2007, at the parties' Initial Joint Case Management Conference, the Court set a further case management conference for March 14, 2008. Pursuant to the Northern District's Local Rule 16-10(d), plaintiff Securities and Exchange Commission (the "Commission" or "SEC") and defendant Nancy R. Heinen ("Heinen") submit this Second Joint Case Management Statement.

///

///

///

Dockets.Justia.com

1. **PROGRESS OR CHANGES SINCE THE LAST CASE MANAGEMENT CONFERENCE**

A. The Commission's Description

In their initial Joint Case Management Statement, the parties set forth substantially different proposals for discovery, with plaintiff proposing a limit of 12 depositions for each party, and defendant proposing a limit of 45 depositions per party. In light of this, at the September 7, 2007 case management conference the Court declined to set a discovery schedule or other pre-trial dates. Instead, the Court directed the parties to proceed with discovery and report on their progress at the next case management conference.

Since that time, plaintiff has noticed five depositions, including defendant Nancy Heinen; Fred Anderson, former Chief Financial Officer of Apple, Inc. ("Apple"); Philip Schimmel, former audit partner for Apple's external auditors, KPMG, LLP; Arthur Levinson, member of Apple's Board of Directors; and Steven Jobs, Chief Executive Officer of Apple. All of these depositions have been completed, with the exception of one that was rescheduled (at the witness's request) to mid-March 2008.

To date, defendant has not noticed any depositions.

B. Ms. Heinen's Description

While Ms. Heinen has raised no objections to the schedule and participated fully in each of the non-party depositions noticed by the SEC, Ms. Heinen has chosen to focus first on collecting the pertinent documents, and then advancing to the depositions phase.

Since the initial case management conference on September 7, 2007, Ms. Heinen has served a further request for production from the SEC and approximately 20 document subpoenas on third-party entities and individuals, including:

(1) Apple's independent auditing firm, KPMG, LLP;

(2) Apple's outside law firm, Wilson Sonsini Goodrich and Rosati, and several attorneys involved in advising Apple's management and reviewing its SEC filings;

(3) Eight financial institutions; and

(4) Two educational institutions.

Although a great many documents have not yet been produced – and certain claims of privilege have yet to be resolved – Ms. Heinen has thus far received approximately 3600 pages of documents in response to these subpoenas. Counsel for Ms. Heinen is now actively reviewing these new documents, in addition to the 90,000 pages of discovery received initially from the SEC, to prepare for the upcoming depositions and identify other witnesses pertinent to her defense.

Beginning last week, Ms. Heinen notified counsel for four current and former Apple employees that she intends to subpoena them for depositions, and we are now attempting to coordinate schedules to find dates convenient to the witnesses and to all counsel. It is our expectation that each of these four depositions will be completed by early May 2008.

2. DISCLOSURES

On July 27, 2007, the parties exchanged initial disclosures pursuant to Federal Rule of Civil Procedure 26. In its disclosures, the Commission identified 20 people likely to have discoverable information that it may use to support its claims, an index to all ten boxes of documents it previously obtained from Apple, and an index to all six boxes of documents it previously obtained from KPMG and six CDs of electronic files it previously obtained from KPMG. On July 30, the Commission produced all of these documents to Heinen's counsel, who had them copied and electronically scanned.

In her initial disclosures, dated July 27, 2007, Heinen identified 49 people likely to have discoverable information that she may use to support her claims or defenses. In addition, she identified certain documents that she may rely on, consisting of documents that she previously produced in response to a Commission administrative subpoena and documents previously produced to the Commission by Apple.

3. PROPOSAL FOR REMAINDER OF CASE

A. The Commission's Description

The primary areas on which discovery will be needed are the factual circumstances surrounding the two options grants at issue in this case (referred to in the Amended Complaint as the

"2001 Executive Team grant" and the "2001 Jobs grant"), and Heinen's knowledge of the accounting rules relating to options, including the general accounting impact of granting an in-the-money option. This discovery can be accomplished efficiently through depositions of people who dealt with Heinen in the process of granting options to Apple's senior executives, including certain members of Apple's Board of Directors; members of the Board's Compensation Committee; senior Apple officers; and Apple's outside accountants and attorneys. Consistent with our belief that discovery can be conducted quickly and efficiently in this matter, the Commission has already noticed the depositions of the defendant and four other individuals.

The Commission does not request any limitations or modifications of the discovery rules, with one exception. The Commission offered to stipulate with the defendant to exceed the limit of 10 depositions per party as set forth in Rule 30(a)(2)(A)(i) of the Federal Rules of Civil Procedure Rule. The Commission believes that as there are only two option grants at issue in this litigation, 24 depositions (12 per party) will be more than sufficient.

B. Ms. Heinen's Description

Factual Matters in Dispute. Ms. Heinen denies the charges brought by the SEC. The principle issues of fact in dispute are: (1) whether Ms. Heinen acted with the requisite scienter to constitute a violation of the securities laws; (2) whether Ms. Heinen created or had knowledge of any allegedly "false" documents; and (3) whether any "measurement date" accounting errors for the option grants in question were material to Apple's financial statements and/or stock price.

Topic Areas for Further Discovery. Consequently, the primary areas on which discovery will be needed are documentary and testimonial evidence showing that: (1) Ms. Heinen did not possess the necessary scienter to violate any of the securities laws – including, for instance, that Ms. Heinen was not aware that the accounting treatment applied to the stock option grants in question was incorrect; (2) Ms. Heinen did not falsify any corporate records; (3) Ms. Heinen did not conceal any material information from the auditors or investing public; and (4) Ms. Heinen did not know that the alleged accounting errors were material to Apple's financial statements, to the investment decisions of ordinary investors, or to Apple's stock price, as the SEC has alleged.

Number of Depositions. As discovery has progressed, Ms. Heinen has made every effort to avoid needless litigation and to streamline the discovery process, without compromising her right to thoroughly investigate and prepare her defense. At the outset of this case, Ms. Heinen estimated that she may need to take as many as 45 depositions. Upon a careful and continuing review of the discovery as well as other informal investigation, Ms. Heinen and her counsel now estimate that 25 depositions should suffice. Accordingly, we propose that both sides be entitled to notice up to 25 depositions during the fact discovery phase, without further permission from the Court.

Discovery Schedule. Given the number of documents produced since the initial case management conference and the number of percipient witnesses yet to be deposed, Ms. Heinen believes it would be prudent to extend the rather ambitious schedule she previously proposed by an additional two months. This will lead to the completion of fact discovery by the end of October 2008, the completion of expert discovery in early January 2009, the filing of dispositive motions by late January 2009, and a trial date in May 2009. Finally, Ms. Heinen also believes that a further case management conference, perhaps to be set for July 2008, would be helpful to both parties.

4. PROPOSED SCHEDULES

A. The Commission's Proposed Schedule:

In the initial Joint Case Management Statement, defendant Heinen proposed a schedule leading to a trial in this matter on March 2, 2009. The Commission hereby adopts, and asks that the Court approve, the schedule previously proposed by Heinen, as follows:

Fact Discovery Cut-Off: Friday, August 29, 2008

Disclosure of Expert Witnesses and Reports: Friday, September 5, 2008

Disclosure of Rebuttal Expert Reports: Monday, October 6, 2008

Expert Discovery Cut-Off: Friday, November 7, 2008

Dispositive Motion Deadline: Monday, November 24, 2008

Pretrial Conference: Friday, February 27, 2009

Trial: Monday, March 2, 2009

B. Ms. Heinen's Proposed Schedule:

Ms. Heinen respectfully submits the following revised discovery plan proposal:

Fact Discovery Cut-Off: Friday, October 31, 2008

Disclosure of Expert Witnesses and Reports: Friday, November 7, 2008

Disclosure of Rebuttal Expert Reports: Monday, December 8, 2008

Expert Discovery Cut-Off: Friday, January 16, 2009

Dispositive Motion Deadline: Friday, March 20, 2009

Pretrial Conference: Friday, May 1, 2009

Trial: Monday, May 18, 2009

5. TRIAL

The case will be tried to a jury. Plaintiff estimates the trial will take approximately 10 days. Defendant estimates the trial will take approximately 14 days.

6. PARTIES' STATEMENT REGARDING ADR

As required by Local Rule 16-10(d), the parties hereby provide the following statement regarding ADR. The parties held an ADR phone conference on September 5, 2007 at 3:00 p.m. However, both parties continue to believe it necessary to develop the facts further through the discovery period before there can be any real chance to settle the case. Accordingly, the parties

///

///

///

continue to recommend that the Court refer this case for a settlement conference with a judicial officer after the completion of discovery and the filing of dispositive motions, if any.

DATED: March 4, 2008

Respectfully Submitted,

/s/ Robert L. Mitchell
Robert L. Mitchell
Mark P. Fickes
Sahil Desai
Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

/s/ Miles Ehrlich
Miles Ehrlich
Ismail Ramsey
Ramsey & Ehrlich
Attorneys for Defendant
NANCY R. HEINEN